

Appendix "A".

GOLD SEAL LIQUORS.

Subject:	<u>Waybill No.</u>	<u>Date</u>	<u>Car No.</u>	<u>Amount</u>
	19520	08/22/68	706222	\$ 93.50
	19708	05/10/69	370156	606.00
	229430	07/26/69	707028	41.00
	19696	06/24/69	100369	40.93
	19726	12/09/69	472358	658.60
	223124	12/08/69	201792	265.95
	19767	12/16/69	479353	640.00
	19785	12/17/69	303541	645.80
	229149	12/23/69	200209	456.75
	19799	12/18/69	478384	642.00
	19806	12/30/69	101062	658.40
	19782	12/29/69	500355	652.80
	19791	12/18/69	250378	640.00
	19852	12/29/69	100460	640.00
	229547	11/08/69	370220	206.55
	229088	12/12/69	700682	249.30
	19750	12/10/69	152274	340.38
	229620	11/13/69	207279	45.71
	229013	06/18/70	30811	392.94
				<hr/> \$8,256.61

(Title Omitted in Printing)

ANSWER AND COUNTERCLAIM

ANSWER.

Now COMES, Gold Seal Liquors, Inc., an Illinois corporation, answering the complaint of the plaintiff and states as follows:

1. Defendant admits the allegations of Paragraph 1 of said complaint.

2. Defendant admits the allegations of Paragraph 2 of said complaint.

3. Defendant admits the allegations of Paragraph 3 of said complaint.

4. Defendant admits that for some time prior to and during the period August 22, 1968, to and including June 18, 1970, Penn Central Transportation Company, a Pennsylvania corporation, later known as Penn Central, received for defendant's account alcoholic beverages.

5. Defendant denies the allegations in Paragraph 5 of said complaint.

6. Defendant denies that Exhibit "A" correctly states or reflects the liability of defendant thereunder.

7. Defendant denies that it is indebted to plaintiffs in the sum of \$8,256.61 or any sum whatsoever.

COUNTERCLAIM.

Defendant, Gold Seal Liquors, Inc., for its counterclaim against plaintiffs states as follows:

1. Jurisdiction of this cause is founded on 28 U. S. C. §§ 1332 and 1337. Plaintiffs and defendant are citizens of different states and the amount in controversy exceeds \$10,000.00, exclusive of interest and costs.

2. Penn Central Transportation Company is a corporation organized under the laws of the State of Pennsylvania and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act, 49 U. S. C. § 1 et seq.

3. Defendant is an Illinois corporation doing business in the Northern District of Illinois.

4. During the period August 22, 1968, to and including June 18, 1970, both inclusive, Penn-Central shipped to defendant in Penn-Central trailers carried on Penn-Central flat cars, alcoholic beverages from company plants and warehouses, which were received by defendant at defendant's warehouse in Chicago, Illinois, in damaged condition, caused by theft or breakage, or both, as a result of plaintiff's lack of care and breach of its contract of carriage enroute. Defendant has paid the freight charges thereon and complying with the terms of the bills of lading and the procedures prescribed by the railroad and under the regulations of the Interstate Commerce Commission, and pursuant to the statute in such case made and provided, filed claims for said damage to said shipments in apt time. The aggregate amount of the damaged merchandise for which defendant filed claims for reimbursement is \$19,319.42. The date of each claim filed and the amount thereof are set forth on Exhibit "A" attached hereto and made a part hereof.

5. Although frequently requested so to do, plaintiffs have failed and refused to pay said sum or any part thereof. To defendant's damage in the sum of \$19,319.42.

WHEREFORE, defendant, Gold Seal Liquors, Inc., prays judgment against plaintiffs, George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company,

dismissing plaintiffs' complaint and that defendant have and recover judgment against plaintiffs for \$19,319.42, together with the costs of this action. Defendant demands trial by jury.

GOLD SEAL LIQUORS, INC.,

By MAX W. PETACQUE,

By THEODORE J. HERST,

Attorneys for Defendant.

10 S. LaSalle St., Chicago, Ill.,
263-5600.

Answer and Counterclaim

CLAIMS OF GOLD SEAL LIQUORS, INC.
FILED AGAINST PENN CENTRAL RAILROAD.

<u>Date of Filing</u>	<u>Amount</u>
12/12/68	\$ 417.00
3/ 7/69	2,720.57
6/30/69	1,023.36
7/31/69	1,807.00
9/30/69	1,186.03
9/24/69	690.67
10/31/69	1,655.50
10/23/69	336.93
11/10/69	619.03
11/20/69	20.00
11/28/69	660.94
11/28/69	1,844.36
11/28/69	802.10
12/16/69	1,204.68
12/16/69	884.71
12/31/69	2,862.87
4/30/70	29.51
4/30/70	21.98
5/28/70	72.14
5/28/70	210.39
6/15/70	249.65
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	\$19,319.42

(Title Omitted in Printing)

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record that the following facts are admitted and agreed upon by the parties and shall be taken as true without any evidence being produced thereon:

1. This action arises under the laws of the United States regulating commerce, 49 U. S. C. §§ 3(2) and 6(7). This Court has jurisdiction of this action under 28 U. S. C. § 1337.

2. Penn Central Transportation Company is a corporation organized under the laws of the State of Pennsylvania and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act, 49 U. S. C. § 1 et seq.

3. Defendant is a corporation doing business in the Northern District of Illinois.

4. During the period August 22, 1968 to and including June 18, 1970, plaintiffs received and transported for defendant's account various consignments of alcoholic liquors.

5. There is due and owing from defendant to plaintiff transportation charges as follows:

Stipulation of Facts

<u>Waybill No.</u>	<u>Car No.</u>	<u>Amount Owing By Defendant</u>
19708	370156	557.52
19726	472358	658.60
223124	201792	265.95
19767	479353	340.00
19785	303541	645.80
229149	200209	456.75
19799	478384	642.00
19806	101062	658.40
19782	500355	652.80
19791	250378	640.00
19852	100460	640.00
229547	370220	206.55
229088	700682	249.30
19750	152274	340.38
229620	207279	45.71
		<hr/>
		\$6,999.76

6. Defendant has filed a counterclaim listing alleged claims for loss and damage with plaintiff, which claims are alleged to be as follows:

Stipulation of Facts

A13

	<u>Date of Filing</u>	<u>Amount</u>
9854	12/12/68	\$ 417.00
B253	3/7/69	2,720.57
B667	6/30/69	1,023.36
B791	7/31/69	1,807.00
B999	9/30/69	1,186.03
B1053	9/24/69	690.67
B1142	10/31/69	1,655.50
B1182	10/23/69	366.93
B1326	11/10/69	619.03
B1355	11/20/69	20.00
B1361	11/28/69	660.94
B1364	11/28/69	1,844.36
B1366	11/28/69	802.10
B1457	12/16/69	1,204.68
B1458	12/16/69	884.71
B1593	12/31/69	2,862.87
B2148	4/30/70	29.51
B2149	4/30/70	21.98
B2271	5/28/70	72.14
B2272	5/28/70	210.39
B2492	6/15/70	249.65
		<hr/>
		\$19,319.42

Of the aforesaid claims for loss and damage plaintiff has admitted that all are valid in the amount shown except as follows:

<u>Claim No.</u>	<u>Amount</u>	<u>Status</u>
B1182	\$ 336.93	Disallowed
B1355	20.00	No record
B1593	2,862.87	No record
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	\$3,219.80	

Stipulation of Facts

In addition to the aforesaid amounts, plaintiff has admitted the existence of further valid claims of defendant as follows:

<u>Claim No.</u>	<u>Amount</u>
2515	\$ 649.00
B2460	244.79
BLNZ0000206141	1,023.36
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	\$1,917.15

Thus, the total amount which plaintiff admits being indebted to defendant by virtue of valid claims filed with it is \$18,016.77.

7. As to said claims filed by defendant in the sum of \$19,319.42, which sum includes claims aggregating \$18,016.77, which plaintiff admits to be valid and owing to defendant; defendant, in establishing said claims, has paid the freight charges therein, has complied with the terms of the bills of lading therefor and the procedures prescribed by plaintiff and to the requirements of the Interstate Commerce Commission and the applicable statutes pertaining thereto, and has filed its said claims for damages in apt time.

8. Pursuant to Order No. 164, entered February 17, 1971, in the reorganization proceedings now pending in the United States District Court for the Eastern District of Pennsylvania entitled "In the Matter of Penn Central Transportation Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 70-347," a Proof of Claim has been recorded as having been filed for defendant

for freight loss or damage in the sum of \$19,631.76, representing \$17,588.48, approved, but not paid, and \$2,042.78 under investigation.

GEORGE P. BAKER, RICHARD C. BOND,
JERVIS LANGDON, JR. and WILLARD
WIRTZ, TRUSTEES OF THE PROPERTY
OF PENN CENTRAL TRANSPORTATION
COMPANY, DEBTOR.

By EDWARD B. GUSTAFSON,
Attorney.

GOLD SEAL LIQUORS, INC.

By THEODORE J. HERST,
One of its Attorneys.

(Title Omitted in Printing)

MOTION FOR SUMMARY JUDGMENT.

Plaintiff, Penn Central Transportation Company, by its attorney, Edward R. Gustafson, moves this Court to enter, pursuant to Federal Rule of Civil Procedure 56(b), summary judgment in said plaintiff's favor and against defendant, Gold Seal Liquors, Inc., in the amount of \$6,999.76 together with interest and costs and, in support thereof, states:

1. The complaint filed in this proceeding alleges that there is due and owing to plaintiff from defendant the sum of \$8,256.61 for unpaid freight charges for transportation performed by plaintiff for and on behalf of defendant during the period August 22, 1968 to and including June 18, 1970.

With respect to the charges alleged to be due, defendant has admitted that said charges are correct in some respects but incorrect in others. The waybill numbers, car numbers, amounts claimed to be due by plaintiff and amounts admitted to be due by defendant, are listed in the stipulation of facts heretofore filed herein. As indicated in said stipulation, amounts admitted to be due and owing by defendant to plaintiff aggregate \$6,999.76.

2. Defendant has filed a counterclaim in this proceeding alleging loss and damage to various shipments of merchandise handled by plaintiff for defendant's account. The claim numbers and amounts thereof are set forth in the stipulation in the total amount of \$19,319.42. Of this

amount plaintiff has admitted the validity of claims aggregating \$18,016.77. The claim numbers, and their amounts, which plaintiff has allowed, disallowed, or has no record of, are set forth in the stipulation.

3. As indicated in the affidavit attached hereto, George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, the petitioners, are trustees of the Penn Central Transportation Company, Debtor. They were appointed on July 22, 1970 by the District Court of the United States for the Eastern District Court of the United States for the Eastern District of Pennsylvania in cause #70-347 with the powers of a trustee under Section 44 of the Bankruptcy Act and the powers of the receiver to operate the business of the Penn Central Transportation Company as a common carrier by railroad engaged in interstate commerce and is licensed to transact business in the State of Illinois. The initial order of the Bankruptcy Court, dated June 21, 1970, approving the petition of the Debtor and making various authorizations and directions is attached hereto.

4. Plaintiff alleges that it is entitled to judgment against defendant in the amount of \$6,999.76 and that defendant is entitled to judgment against plaintiff in the amount of \$18,016.77. Plaintiff contends, however, that the law pertaining to the reorganization of a railroad does not permit an offset or set off of one claim against the other resulting in a net judgment for defendant.

5. The affidavit of Edward R. Gustafson is attached hereto.

WHEREFORE, plaintiff moves that it have judgment against defendant in the amount of \$6,999.76 and that de-

Motion for Summary Judgment

defendant have judgment against plaintiff in the amount of \$18,016.77.

GEORGE P. BAKER, RICHARD C. BOND,
JERVIS LANGDON, JR. AND WILLARD
WHITE, TRUSTEES OF THE PROPERTY
OF PENN CENTRAL TRANSPORTATION
COMPANY, DEBTOR,

Plaintiff.

By: EDWARD R. GUSTAFSON.
Edward R. Gustafson.

Edward R. Gustafson,
Attorney for Plaintiff.
532 Union Station,
Chicago, Illinois 60606
Central 6-7200, Ext. 2641

(Title Omitted in Printing)

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

AFFIDAVIT.

Edward R. Gustafson, who is Assistant General Attorney of the Penn Central Transportation Company, and whose address is Room 532 Union Station, 516 W. Jackson Blvd., Chicago, Ill., 60606, being duly sworn, deposes and says that:

1. George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, the petitioners are trustees of the Penn Central Transportation Company, Debtor. They were appointed on July 22, 1970 by the District Court of the United States for the Eastern District Court of the United States for the Eastern District of Pennsylvania in cause #70-347 with the powers of a trustee under Section 44 of the Bankruptcy Act and the powers of the receiver to operate the business of the Penn Central Transportation Company as a common carrier by railroad engaged in interstate commerce and is licensed to transact business in the State of Illinois. The initial order of the Bankruptcy Court, dated June 21, 1970, approving the petition of the Debtor and making various authorizations and directions is attached hereto.

2. The Penn Central System comprises 21.4% of the miles of road operated by the railroads of the United States and 42.3% of the miles of road in the eastern district.

3. Penn Central Transportation Company in 1969 handled 11.3% of the tonnage of freight moved by railroads in the United States and 26.3% of the freight tonnage in the eastern district.

4. Penn Central Transportation Company revenues comprise 14.4% of the revenues of the class 1 railroads in the United States and 34% of the revenue in the eastern district.

5. The Penn Central Transportation Company serves 86,000 shippers.

6. The class 1 railroads of the United States provided the movement of 780,000,000 freight ton-miles of service in 1969, which is 41% of the intercity freight ton-miles moved in the United States. Trucks moved 21.2% in terms of ton-miles, and other modes of transportation (pipeline, barge, etc.) moved 37.8%. Of the total freight ton-miles of service provided by the United States railroads, Penn Central Transportation Company provided 11.5%, and of the total provided by the railroads in the eastern district, Penn Central Transportation Company provided 34%.

7. Penn Central under the guidance of the Trustees has materially improved its service to the point that complaints from shippers about service deficiencies have dropped 94%. However, the railroad operation continues to register a very substantial deficit and the Trustees predict that cash made available from Government guarantees will be exhausted and if the operation is to continue further cash will be required from some source by the first quarter of 1972. In the meanwhile, freight traffic has fallen off due to the general economic slow down (3.8% during the first half of 1971 below the 1970 figure with a greater decline [over 8%] during the last few weeks). The mineworkers' walkout and the longshoremen's strike have caused serious loss of traffic. While some progress toward viability has been made, if these trends continue the future is unpredictable.

8. In the reorganization proceedings, the proof of claim procedure has resulted in the filing of 9600 claims for loss and damage in the amount of \$29,600,000. Of accounts

receivable, about 55,000 items totaling \$59,200,000 are past due in the sense that they are older than 90 days. At the time Penn Central Transportation Company went into reorganization on June 21, 1970, such past due accounts receivable totaled \$28,000,000.

9. The facts stated herein are true and correct to the best of his knowledge and belief.

EDWARD R. GUSTAFSON.

Subscribed and sworn to before me this 17th day of November, 1971.

MARIE M. MARSHALL
Notary Public

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

No. 70-347

In The Matter Of

PENN CENTRAL TRANSPORTATION COMPANY,
Debtor.

ORDER.

Upon due consideration of the petition of Penn Central Transportation Company, the above named Debtor, verified June 21, 1970 and filed herein this day, and the Court being satisfied that such petition complies with Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) and has been filed in good faith, it is ORDERED:

1. Said petition be, and it hereby is, approved as properly filed under said Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205).

2. The Debtor shall be, and it hereby is, authorized and directed, pending further order of this Court, to run, manage, operate, maintain, preserve and keep in proper condition and repair the railroad and properties, including leased railroads and property, of the Debtor wherever situated, whether in this State, judicial district, or elsewhere; to manage, operate and conduct its business,

and to this end to exercise its authority, rights and franchises and to discharge its public duties; to employ and discharge and fix the compensation of, all officers, agents, employees and counsel; to continue any existing arrangements or otherwise arrange with others for rendering services to the Debtor or for the payment of expenses incurred by others on behalf of or for the account of the Debtor in connection with the management, operation and conduct of the Debtor's railroad, properties and business including, without limitation, executive, supervisory, accounting, financial, engineering, operating, real estate, purchasing, insurance, tax and administrative services, and to fix and pay the compensation therefor whether on a basis of reimbursement of charges actually incurred or otherwise; to collect and receive the income, rents, revenues, tolls, issues and profits, accrued or to accrue, from its railroad and properties; to collect all outstanding interline and other accounts owing to the Debtor, and all dividends and interest on securities belonging to it; to sell, convey or lease property of the Debtor, real or personal, not needed in the operation of its railroad, and to exercise such rights of sale, conveyance, exchange and release as are reserved to, or available to, the Debtor under its outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use, or cause to be applied, the proceeds of sale of released property as provided in such instruments, all in the same manner that the Debtor would be entitled to do in its own right; to the extent necessary to protect or preserve its railroad, or properties or business, to make and pay for additions, betterments and improvements thereto and thereof; to perform its existing contracts made in the regular course of business to the extent that performance thereof may seem desirable, but such performance shall not constitute an

affirmance of said contracts or any thereof; and to enter into and perform other contracts in the regular course of the conduct of its business; all to the end that the business of the Debtor may be continued, operated and managed according to the customary and usual manner of conducting the same, and all of the foregoing powers to be exercised by the Debtor according to law and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

3. The Debtor is authorized in its discretion, from time to time until the further order of this Court, out of funds now in its possession or hereafter coming into its hands, to pay all or any of the following, in whole or in part, without limiting the generality thereof, and to adjust or compromise the same:

A. Taxes, assessments and other governmental charges now due or hereafter coming due upon or measured by, the properties, pay-rolls, income, franchises or business of the Debtor;

B. All other current expenses and costs hereafter necessarily incurred in operating, maintaining and preserving its railroad and other properties, collecting the revenues, and conducting the business of the Debtor, whether or not chargeable to operating expenses under applicable accounting rules; including, without limitation, all wages, salaries and compensation of officers, agents, employees, consultants and counsel employed or retained by the Debtor, all inter-line accounts and balances owing by Debtor, including amounts in respect of revenues from freight, passenger or other traffic interchanged with other carriers, and charges for repairs of, or loss or damage to, rolling stock and equipment interchanged with

other carriers, all claims for injuries, death or other loss or damage to passengers and others arising from the operation of its railroad and properties, and all claims for loss, damage or delay to freight and baggage, and all claims for overcharges and for reparation, and all accounts for services, materials and supplies rendered or furnished to the Debtor, whether chargeable in the first instance to expenses, or otherwise; provided, that any of the foregoing accounts and claims may, in the discretion of the Debtor, either be paid in full or adjusted or compromised;

C. All amounts hereafter coming due, whether as rent, car hire, per diem, mileage or otherwise, in respect of the use or possession by the Debtor of locomotives, cars and other rolling stock and equipment, including the principal of, and interest or dividends on, equipment obligations issued, guaranteed or assumed by the Debtor; and all amounts hereafter coming due under any lease, joint facility contract, or other contract or agreement, for or in respect of the occupation or use by the Debtor, whether solely or jointly, of lines of railroad, terminals, docks, piers, tracks, buildings, depots, sidetracks, yards, warehouses, shops, bridges, interlocking plants and other railroad property and facilities; provided, however, that no such payment or payments shall constitute an affirmation or adoption of said leases, joint-facility contracts or other contracts or agreements, or any of them;

D. All liabilities and costs hereafter coming due in respect of the construction or acquisition of property or work heretofore authorized and actually initiated or contracted for by the Debtor and constituting additions, betterments or improvements of any railroad property of or used by the Debtor; but, with-

out further order of this Court, no expenditure shall be made for any acquisition, construction or work constituting an addition, betterment or improvement, not heretofore authorized and actually initiated or contracted for by the Debtor, except for additions, betterments and improvements necessarily incident to the current maintenance and preservation of the Debtor's railroad and properties;

E. All claims, liabilities and costs of the characters specified in the foregoing paragraphs B, C and D of this order incurred by the Debtor and coming due within six months preceding the date of this order in the usual and customary operation of its railroad and properties and the conduct of its business; provided, however, that no payment shall, without the further order of this Court, be made under paragraph E in respect of any additions, betterments and improvements not necessarily incident to the current maintenance and preservation of the Debtor's property, and provided, further that no liability or cost coming due more than six months preceding the date of this order shall be paid by the Debtor without the further order of this Court; except as provided in paragraphs A and F of this order;

F. All outstanding checks or vouchers for wages, salaries or other compensation for services, regardless of when issued; and all claims preferred under Section 77(n) of the Bankruptcy Act (11 U.S.C. Sec. 205(n)), regardless of when accrued or of the time of presentation or assertion thereof, but any such claims may be paid in full, or adjusted or compromised by the Debtor, in its discretion;

G. The cost of maintaining the corporate existence of the Debtor, including corporate, franchise, stamp

and similar taxes, such office rent and relocation of offices as may be required, and the necessary expense of keeping and preserving its corporate records, of maintaining offices and agencies for transferring and registering its stock and bonds, and the proper charges and expenses of trustees under indentures or mortgages pursuant to which securities of, or assumed or guaranteed by, the Debtor have been issued;

H. All payments due from time to time on established retirement and compensation arrangements, and all group insurance carried in whole or in part by the Debtor;

I. Court costs and costs incurred before various State and Federal Commissions or other administrative boards or tribunals; and

J. The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this proceeding, reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause and such others as may have any interest therein, such expense to be taxed as costs in this proceeding.

Until the further order of this Court, no payment shall be made by the Debtor upon or in respect of the principal of, or interest on, any of its funded or floating debt, except the principal of, and interest or dividends on, equipment obligations issued, guaranteed or assumed by the Debtor.

4. The Debtor shall have the power to elect whether to adopt or continue in force, or to refuse to adopt or continue in force or to disaffirm or reject, any lease, trackage, terminal, crossing or operating agreement, or

other contract not fully performed to which it is a party or under which it may be obligated; and the Debtor, or the trustee or trustees hereafter appointed and qualified, shall be allowed a period of six months (or such further period as this Court may allow) from the date of the entry of this order to make such election. Such elections may be made from time to time, and any such election shall be made by instrument in writing, signed by the duly authorized officer or officers of the Debtor, or by such trustees of the property of the Debtor as may hereafter be appointed and qualify, and delivered, or mailed by registered mail, postage prepaid, addressed to the other party or parties to said lease, agreement or contract; and any such election shall be effective when a copy of such instrument, together with proof of delivery or mailing of a copy or copies thereof as aforesaid to the other party or parties to such lease, agreement or contract shall be filed of record in this proceeding. No occupancy, conduct or user of property or rights by the Debtor, or payments made by the Debtor as rent or otherwise or accepted by it as rent or otherwise, or any other acts or omissions by the Debtor during said period (or such other period as this Court may allow), except an instrument filed and delivered or mailed as aforesaid expressly electing to adopt any such lease, agreement or contract shall be deemed to preclude or conclude the Debtor in respect of such election or be deemed to constitute an election to adopt or continue in force any such lease, agreement or contract. In case payments are made pursuant to the foregoing authority contained in Subdivision C of paragraph 3 hereof and any such leases, agreements or contracts shall be subsequently adopted by the Debtor, or such trustee or trustees of the property of the Debtor as may hereafter be appointed and qualify, or pursuant to a plan of reorganization, said payments shall be deemed to have been made on account of

the rental due from the Debtor under such leases, agreements or contracts. In case any such lease, agreement or contract shall be disaffirmed or rejected by the Debtor, or by such trustee or trustees, or under a plan of reorganization, the operation of the leased or used properties shall be deemed to have been, and such payments to have been made, for the account of the lessors or owners, respectively, and such payments shall be recovered, set off, or made and charged, on the earnings or properties, or both, of the respective lessor or owner, as the case may be, prior to any mortgage or other lien thereon, by such method as the Court shall determine; and all rights and equities of the parties arising from such payments shall be reserved for later determination.

5. Pending further order of the Court, the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights, and to liquidate, compromise, adjust or make settlement, by written agreement or consent judgment or otherwise, of any thereof; and likewise to defend and to liquidate, compromise, adjust or make settlement of any actions, proceedings or suits now pending against the Debtor or which may hereafter be asserted or be brought in any court or before any officer, department, commission or tribunal to which the Debtor is or shall be a party; but no payment shall, without further order of this Court, be made by the Debtor in respect of any such actions, proceedings or suits on claims accruing prior to the date of this order, except such claims as may be permitted to be paid by this order or by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action

taken by the Debtor in defense or settlement of such claims, actions, proceedings or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist.

6. The Debtor shall close its present books of account as of midnight on June 21, 1970, and shall open new books of account as of 12:01 A.M. E.D.S.T. on June 22, 1970, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers for all payments made by the Debtor, and shall deposit the monies coming into its hands in the banks in which funds of the Debtor are presently deposited, or such thereof as shall be selected by the Debtor, or in such other bank or banks as shall be selected by the Debtor.

7. Depositories of Debtor's funds be and each of them hereby is authorized to honor all checks, drafts and vouchers drawn by Debtor against its account or accounts and to carry on similar banking transactions with the Debtor without regard to the fact that the petition of the Debtor heretofore filed under Section 77 of the Acts of Congress relating to bankruptcy has been approved by this Court.

8. Not later than August 17, 1970, unless the time be extended by further order of this Court, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on June 21, 1970, and within 60 days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of such calendar month, together with a summary statement of the revenues and

expenses of the Debtor, for such calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

9. All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, provided that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and provided, further, that the title of any owner, whether as trustee or otherwise, to rolling stock equipment leased or conditionally sold to the Debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this order.

10. All persons, firms and corporations, holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits be and each of them

hereby are restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, or from offsetting the same, or any thereof, against any obligation of the Debtor, until further order of this Court.

11. The Debtor hereby is directed to give notice by mailing a copy of this order to the trustee or trustees under each mortgage or other indenture pursuant to which any securities of, or assumed or guaranteed by, the Debtor, have been issued, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date of the entry of this order, once each in the *Evening Bulletin* and the *Philadelphia Inquirer*, newspapers published in the City of Philadelphia, State of Pennsylvania, once in *The New York Times* and the *Wall Street Journal*, newspapers published in the City of New York, State of New York, and in the *Chicago Tribune*, a newspaper published in the City of Chicago, State of Illinois, of a hearing to be held on July 15, 1970, at 11:00 o'clock A.M., in Court Room No. 3 of this Court in the United States Court House, Ninth and Market Streets, Philadelphia, Pennsylvania, at which hearing or any adjournment thereof this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof and designated "Exhibit A." When such mailing and publication have been completed the Debtor shall file with the Clerk of this Court its sworn report with respect thereto.

12. This Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall deem proper limiting the time within which suits against the Debtor may be brought, staying any suits now pending or hereafter brought against the Debtor, appointing a trustee or trustees of all of said Debtor's property and estate,

with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests and, in general, such orders amplifying, extending, supplementing, limiting or otherwise modifying this order as to the Court may at any time seem proper.

C. WILLIAM KRAFT, JR.,
U. S. District Judge.

June 21, 1970.

Exhibit "A"

**NOTICE TO ALL CREDITORS AND
STOCKHOLDERS OF THE
PENN CENTRAL TRANSPORTATION COMPANY**

Pursuant to an order entered June 21, 1970, by the District Court of the United States for the Eastern District of Pennsylvania, notice is hereby given that a hearing will be held on July 15, 1970, at 11:00 o'clock A.M., before that Court in Court Room No. 3, in the United States Court House, Ninth and Market Streets, in the City of Philadelphia, Pennsylvania, at which hearing or any adjournment thereof that Court will, pursuant to the provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) relating to bankruptcy, appoint one or more trustees of the property of said Penn Central Transportation Company.

Dated, June , 1970.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 3205

GEORGE P. BAKER, RICHARD C. BOND, JERVIS
LANGDON, JR. AND WILLARD WIRTZ, TRUS-
TEES OF THE PROPERTY OF PENN CENTRAL
TRANSPORTATION COMPANY, DEBTOR,
Plaintiffs,

v.

GOLD SEAL LIQUORS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER.

This is an action by the trustees of the property of the Penn Central Transportation Company for unpaid freight charges for transportation performed by the Penn Central for and on behalf of defendant during the period August 22, 1968 to and including June 18, 1970. The defendant has filed a counterclaim alleging loss and damage to various shipments of merchandise handled by the Penn Central for defendant's account, and alleging that the freight charges as to these lost and damaged shipments have been paid.

The parties have filed a stipulation of facts in which they agree that \$6,999.76 in transportation charges is due and owing from defendant to plaintiffs and that \$18,016.77

is due and owing from plaintiffs to defendant for loss and damage to certain shipments.

The case is now before the Court on plaintiffs' motion for summary judgment in favor of each party for the stipulated amounts. Plaintiffs contend, however, that the law pertaining to the reorganization of a railroad does not permit a set-off of one judgment against the other, resulting in a net judgment for defendant. The question presented, then, is whether this Court should allow the set-off of one judgment against the other.

On June 21, 1970, the United States District Court for the Eastern District of Pennsylvania entered an order approving the petition of the Penn Central Transportation Company for reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. § 205, et seq. Section 68(a) of the Bankruptcy Act (11 U.S.C. § 108(a)) provides that:

In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

This case is collateral to the reorganization proceedings and was brought by the trustees in exercise of their power to gather assets and keep the business going. In such a suit, Section 68(a) applies only by way of analogy, based on the equities of the situation. *Lowden v. N. W. National Bank*, 298 U.S. 160 (1936).

The plaintiffs contend that Section 68(a), although unequivocal on its face, is generally not applied in reorganization cases as it is in straight bankruptcy proceedings since the purpose of reorganization is to "save a sick business, not to bury it and divide up its belongings." *Susquehanna Chemical Corp. v. Producers Bank & Trust Co.*, 174 F.2d 783, 787 (3rd Cir. 1949).

The plaintiffs have also pointed out that the reorganization court in which the Penn Central filed its petition for reorganization has consistently refused to allow set-offs. The set-offs involved there, however, were extra-judicial attempts at self-help which that court felt would hamper the administration of the reorganization.

The plaintiffs have cited no authority to support the entry of judgments on both the claim and counter-claim while at the same time denying a set-off of one against the other. Nor would that be the equitable course of action to follow in the instant case. The defendant is being precluded from satisfying *any* judgment it receives in the instant case as a result of the pending reorganization proceedings. It should not suffer further damage by being precluded from a set-off of its judgment against that of the plaintiffs.

For the reasons stated herein, the plaintiffs' motion for summary judgment is granted. The plaintiffs are indebted to the defendant in the amount of \$18,016.77 and the defendant is indebted to the plaintiffs in the amount of \$6,999.76. Therefore, a net judgment is hereby entered in favor of defendant and against plaintiffs in the amount of \$11,017.01.

ENTER:

ALEXANDER J. NAPOLI,
United States District Judge.

DATED: March 16th, 1972

COURT OF APPEALS OPINION.

(Filed August 23, 1973.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972—APRIL SESSION, 1973

No. 72-1386

GEORGE P. BAKER, RICHARD C. BOND,
JERVIS LANGDON, JR., AND WILLARD
WIRTZ, TRUSTEES OF THE PROPERTY
OF PENN CENTRAL TRANSPORTA-
TION COMPANY, DEBTOR,
Plaintiffs-Appellants,

v.

GOLD SEAL LIQUORS, INC.,
Defendant-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

ALEXANDER, J.
NAPOLI, D.J.
No. 70 C 3205

ARGUED APRIL 20, 1973—DECIDED AUGUST 23, 1973

Before SWYGERT, *Chief Judge*, HASTINGS and MURRAH,*
Circuit Judges.

MURRAH, *Circuit Judge.* The trustees of the Penn
Central Transportation Company in a Section 77 reorgani-
zation proceeding in the District Court for the Eastern

* Alfred M. Murrah, of the Tenth Circuit, sitting by designation.

District of Pennsylvania brought this plenary suit in the Northern District of Illinois against Gold Seal Liquors, Inc. to recover \$6,999.76 for accrued freight charges. Gold Seal Liquors counterclaimed for \$18,016.77 for cargo loss and damages. The Illinois court allowed a setoff and rendered judgment against the trustees for the balance in the sum of \$11,017.01. The respective accounts are not disputed. The sole question is the propriety of the setoff.

It seems to be agreed that the setoff provisions of Section 68 of the Bankruptcy Act do not necessarily obtain in a reorganization proceeding of this kind. That is, see *Susquehanna Chemical Corp. v. Producers Bank & Tr. Co.*, 174 F.2d 783 (3d Cir. 1949), and *Lowden v. N. W. National Bank*, 298 U.S. 160 (1936). Nor do the trustees contend that the Illinois court was not empowered to grant the setoff. The contention is that "considerations of judicial comity should have persuaded" the Illinois court to honor Order No. 571 of the bankruptcy court enjoining all persons, firms and corporations holding credits for the account of the debtor from offsetting them against any obligation of the debtor.

Giving force and effect to Order No. 571, the bankruptcy court has held in a summary contempt proceeding that Section 77(a) conferred upon it "exclusive jurisdiction of the debtor and its property wherever located"; that choses in action are property of the debtor and in the actual or constructive possession of the debtor; and that it would prejudice the public interest in the continuation of railroad service to allow setoffs to deprive the debtor of sorely needed bank cash. See *Penn Cent. Tr. Co. v. National City Bank of Cleveland, Ohio*, 315 F. Supp. 1281 (E.D. Pa. 1970). The banks in that case were accordingly summarily ordered to restore the bank balances which they had set off against debts owed them by the railroad. 315 F. Supp. at 1285.

This order, however, did not undertake to formally adjudicate the rights of the parties, it merely restrained the banks from exercising the remedy of self-help. See 315 F. Supp. at 1284.

In a plenary suit indistinguishably similar to ours, the Indiana court declined to adjudicate the counterclaim or to allow a setoff on the grounds that, inasmuch as Order No. 571 expressly enjoined setoffs, counterclaims must be filed and adjudicated by the bankruptcy court along with the claims of other creditors. See *Penn Central Transp. Co. v. March Warehouse Corp.*, 356 F. Supp. 567 (S.D. Ind. 1972).

We cannot agree that "judicial comity" dictates forbearance of the exercise of the jurisdiction of the court in cases of this kind. The trustees having invoked the jurisdiction of the Illinois court for the adjudication of the railroad's claim, there is nothing in the principles of "judicial comity" to require the Illinois court to withhold the full exercise of its jurisdiction.

After all, plenary actions by trustees in a reorganization proceeding are nothing more than ordinary lawsuits. See, e.g., 5 Moore's Federal Practice ¶38.30(4). The power to adjudicate the subject matter is unquestioned and unquestionable. The Federal Rules of Civil Procedure undoubtedly apply (see 7 Moore's Federal Practice ¶81.04(1)), and a counterclaim is permissible, even compulsory (see Fed. R. Civ. P. 13(a)-(c), and 3 Moore's Federal Practice ¶¶ 13.12(1) and 13.13). Both the claim and the counterclaim are upon stated accounts—equitable principles do not serve to shape or fashion the relative rights and remedies of the parties.

The adjudication of the claims in the Illinois court is a matter of law. The satisfaction of the resulting judgment is subject to the equitable principles generally applicable in a court of bankruptcy. The judgment of the Illinois

court must now be submitted to the reorganization court with all other claims, to be satisfied in accordance with the appropriate orders of that court.

The judgment is affirmed.

Supreme Court of the United States

No. 73-804

George P. Baker, et al.,

Petitioners,

v.

Gold Seal Liquors, Inc.

ORDER ALLOWING CERTIORARI. Filed **January 21**, 19 **74**.

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Seventh** Circuit is granted.